No. 85-2079

In The
Supreme Court of the United States
October Term, 1986

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL.,

Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE TRI-STATE U.F.C.W. AND EMPLOYERS BENEFIT FUND AS AMICUS CURIAE

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INTEREST OF THE TRI-STATE U.F.C.W. AND EMPLOYERS BENEFIT FUND

The Tri-State U.F.C.W. and Employers Benefit Fund (hereinafter "Tri-State") is a multiemployer health and welfare fund, which receives contributions from 75 employers and provides benefits to approximately 12,000 participants, including employees and their dependents. Each of the employers is signatory to a collective bargaining agreement with Local 23 of the United Food and Commercial Workers. These collective bargaining agreements extend for various time periods and expire at various times throughout the year. It is not uncommon for employment to continue after a particular agreement has expired until a new contract is negotiated, without any formal extension agreement and without the employer and union bargaining to impasse over the issue of ongoing contributions to Tri-State. In such cases, contributions to Tri-State continue to be due under the National Labor Relations Act (hereinafter "NLRA").

Tri-State is vitally interested in decisions which hamper its Trustees in meeting their statutory obligation to recover delinquent contributions. The decision of the Ninth Circuit in the instant case is one such decision. In addition, Tri-State has filed a Petition for a Writ of Certiorari to the Court at No. 86-208, from a similar decision of the Third Circuit.

Tri-State urges reversal of the decision of the court below for several reasons. It is anticipated that the Petitioners in the instant case will address thoroughly the position which Tri-State shares, that ERISA Section 515 obligates an employer to continue to make contributions

after a collective bargaining agreement expires. Therefore, this brief will focus on why the NLRA does not preempt a fund's claim to contributions under the terms of an expired collective bargaining agreement. which the employer is bound by the NLRA to observe until the parties have reached impasse.

SUMMARY OF ARGUMENT

In 1974, Congress established a statutory scheme for the collection of delinquent contributions under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (hereinafter "ERISA"). That statutory scheme was subsequently amended by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA").

Section 515 of ERISA obligates an employer to make contributions under the terms of a plan or under the terms of a collectively bargained agreement. Section 502 of ERISA creates a federal remedy for funds to collect contributions from employers who breach their duty under Section 515. Section 8(a) of the NLRA obligates an employer to adhere to the terms and conditions of an expired collective bargaining agreement until a new agreement or bargaining impasse is reached. It is submitted that contributions which arise after the expiration of a collective bargaining agreement, but before impasse, are contributions due under the terms of a collectively bargained agreement, and are therefore due under Section 515.

The NLRA does not preempt Section 515 of ERISA in situations where the obligation to contribute arises under Section 8 of the NLRA, 29 U.S.C. § 158. The doctrine of preemption is not applicable where it cannot "fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB". *Vaca v. Sipes,* 386 U.S. 171, 179 (1967). This is especially true where the NLRA fails to provide a complete remedy for the collection of delinquent contributions due after the expiration of a collective bargaining agreement. As a result, the decision of the Ninth Circuit in the instant case should be reversed on the grounds that federal court jurisdiction exists under Sections 502 and 515 of ERISA for funds to recover delinquent contributions due after the expiration of a collectively bargained agreement, but before impasse has been reached.

ARGUMENT

I. A FUND'S CLAIM UNDER SECTION 515 OF ERISA IS NOT PREEMPTED BY THE NLRA.

The Court has long recognized that the NLRB does not have exclusive jurisdiction over all unfair labor practices. In *National Labor Relations Board v. Strong,* 393 U.S. 357 (1969), the Court stated:

> Admittedly, the Board has no plenary authority to administer and enforce collective bargaining contracts. Those agreements are normally enforced as agreed upon by the parties, usually through grievance and arbitration procedures, and ultimately by the courts. But the business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ."

> [citation omitted.] . . . Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other. [citations omitted.] . . . *Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts.* [Footnote omitted and emphasis added.]

393 U.S. at 360-361. *See also, Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975).

Moreover, the Court has "refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.'" *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25,* 430 U.S. 290, 297 (1977) (citations omitted).

The preemption doctrine has never been rigidly applied by the Court to cases "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca,* 386 U.S. at 179. For several reasons, it cannot be inferred that Congress intended exclusive jurisdiction to lie with the NLRB over issues involving an employer's failure to pay contributions to a multiemployer fund after a collective bargaining agreement has expired, but before impasse has been reached on the issue of contributions to the fund.

First, MPPAA was passed in 1980, well after the Court's decisions in *Connell* and *Strong, supra,* which

recognized that where there is an independent federal remedy which is consistent with the NLRA, the parties may have a choice of federal remedies. Second, Section 515 of ERISA, as amended, does not require that an action to enforce its provisions be taken in a forum other than a district court.

Third, interpretation of Section 515 of ERISA as incorporating an obligation embodied in the NLRA is completely consistent with the purpose of Section 515, and is consistent with other legislation. Congress has previously enacted other legislation which has been interpreted to do exactly that. For example, Section 303 of the Labor Management Relations Act (hereinafter "LMRA") incorporates Section 8(b)(4) of the NLRA. In enforcing Section 303 of the LMRA, it is the courts and not the NLRB which decide whether an unfair labor practice under Section 8 (b)(4) has been committed. *Farmer,* 430 U.S. at 297 n.8.

Similarly, in litigation under MPPAA concerning withdrawal liability, federal courts must decide issues regarding impasse and refusal to bargain in order to determine whether an employer's obligation to contribute has ceased permanently under MPPAA. ERISA § 4212(a), 29 U.S.C. § 1392(a). Because Section 4212(a) of ERISA was enacted at the same time as Section 515 of ERISA, Congress was certainly aware that MPPAA would involve the courts in reviewing unfair labor practice issues.

Fourth, in determining the applicability of the preemption rule to a class of cases relating to the duty of fair representation, the Court has considered the unique interests of the parties. In *Vaca,* the Court noted that the NLRA seeks to promote industrial peace and the improve-

ment of wages and working conditions. 386 U.S. at 182. The Court also noted that the collective bargaining system necessarily subordinates the interests of the individual employees to the collective interests of all employees in a bargaining unit. *Id.* The Court warned that preempting federal court jurisdiction over duty of fair representation cases would foreclose the district courts from their "traditional supervisory jurisdiction" so that an "employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Id.*, (citations omitted).

The interests of multiemployer funds are equally unique, in that trustees may be required to provide earned pension credits and other benefits to participants even where contributions are not received. The Court has recognized that a trust fund is reasonable in operating under the assumption that it would be liable for pension claims even where an employer has failed to make required contributions. *Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 105 S.Ct. 2833, 2845 n.20 (1985). The Funds are in need of the federal court's traditional supervisory jurisdiction over delinquent contributions, so that the trustees of these funds can be assured of a means of collecting their contributions. They will not be so assured if the preemption doctrine is applied to the instant and similar cases.

The NLRB has certain jurisdictional limitations which could limit a fund's ability to recover contributions in an NLRB proceeding. For example, the NLRB declines to

exercise jurisdiction over non-retail enterprises where the gross inflow or outflow of goods affecting commerce is less than $50,000. *See Culligan Soft Water Service*, 149 N.L.R.B. No. 2 (1964). In addition, as noted by the Court in *Vaca, supra*, the General Counsel has unreviewable discretion to decline to prosecute a case.

The NLRB also has the right to accept unilateral settlements in unfair labor practice cases despite objections by the charging party. See 29 C.F.R. § 101.9(c). This might result in payment to the fund of only a percentage of the amount due, and without interest, which is a mandatory remedy under ERISA § 502. As noted, the trustees might be required to fund the participant's benefit or claim without receiving from the settlement all of the necessary contributions. Such a settlement, if entered into by the trustees, might be a breach of the fiduciary obligations of the trustees. However, the NLRB is not a fiduciary and is not required to act in the best interests of the participants, but rather is charged with effectuating the purposes of the NLRA. *See, N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

There is a six-month statute of limitations for filing an unfair labor practice charge. NLRA § 10(b), 29 U.S.C. § 160(b). Whereas the six month statute of limitations is justified where the union and employer are involved in daily interaction, a fund may not become aware within six months of the exact nature of contributions which may be due from a contributing employer. Like many funds, the Tri-State's procedure for the collection of contributions initially involves self-reporting by the employer. If the employer does not accurately disclose all of its employees for whom contributions are due, it is very likely that Tri-State

or a similar fund might not become aware of these omissions until after the six month statute of limitations has run. Tri-State confirms the accuracy of employers' reports by conducting audits. With the number of employers in the Tri-State, employers are audited approximately once each three years. It is obvious that under normal audit procedures, contributions may be discovered which are due for periods outside the six month statute of limitations. If bound by the NLRA statute of limitations, funds will be required to conduct audits far more frequently, at increased expense.

Even if a fund prevails in an unfair labor practice before the NLRB, it will not receive attorney's fees and may not receive interest or liquidated damages which would have been awarded under Section 502(g) of ERISA in a successful action to enforce Section 515 of ERISA. The NLRB recently has refused to award interest where an employer failed to pay fringe benefit contributions. *David Ashcraft Co.*, 279 N.L.R.B. No. 94 (1986). Because the plan provided for liquidated damages in the event of non payment of fringe benefit contributions, the NLRB concluded that there existed a privately agreed-upon substitute for the award of interest on unpaid contributions. The decision is clearly at odds with Section 502(g) of ERISA, which requires the award of interest in addition to liquidated damages. *See United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn and McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986).

The remedies contained in Section 502(g) of ERISA were provided to deter misconduct and ensure compliance, *Winterrowd v. David Freedman and Company, Inc.*, 724 F.2d 823 (9th Cir. 1984), and clearly do provide an inducement for employers to honor their contribution obligations. If an employer will not face the remedies under Section 502(g), and realizes that settlement is possible through the NLRB at less than the full amount of contributions owing, there is a disincentive to honor its obligations to the fund.

The NLRB has not demonstrated a desire to pursue collection claims for funds. Chairman Dotson of the NLRB has already referred to the Board's "heavy workload" and has criticized the use of unfair labor practice proceedings to collect delinquent fringe benefits contributions. *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting). *See also Can Do, Inc.*, 279 N.L.R.B. No. 108 (1986) (Dotson, dissenting); *Can Do, Inc.*, 279 N.L.R.B. No. 111 (1986) (Dotson, concurring in part and dissenting in part).

Finally, the Court's decision in *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364 (1984) and *Central States, supra*, stressed the independence of trustees of multiemployer funds from unions and the Department of Labor. The Court recognized the importance of that independence because of the trustees' significant obligation to collect contributions from contributing employers. In the same manner that individual employees injured by an arbitrary or discriminatory conduct must be assured of an impartial federal court in a duty of fair representation case, trustees of a multiemployer fund must be assured of an action in federal court to enforce Section 515 of ERISA, so that they can adequately perform their statutory fiduciary obligations.

II. JURISDICTION TO ENFORCE SECTION 515 OF ERISA MUST LIE IN THE FEDERAL COURTS TO RECOVER CONTRIBUTIONS AFTER THE EXPIRATION OF A COLLECTIVE BARGAINING AGREEMENT BUT BEFORE IMPASSE TO AVOID COMMONPLACE SITUATIONS WHERE A FUND WOULD BE WITHOUT A FORUM TO DETERMINE WHETHER CONTRIBUTIONS ARE DUE.

In the instant case, it is apparent that the employer violated the NLRA if it ceased making fund contributions before impasse was reached regarding contributions to the fund. However, other situations can arise after a collective bargaining agreement has expired in which the employer's conduct is not so clearly a violation of Section 8(a) of the NLRA. For example, in the Tri-State case before the Court at 86-208, the employer continued to observe the terms of the collecting bargaining agreement, and made contributions after the agreement had allegedly expired. However, the employer refused to pay contributions for employees separated from employment after stores in its Altoona Division were closed. Although the employer recognized its obligation to make the contributions if the employees had been laid off, the employer contended that within the meaning of the terms of the expired collective bargaining agreement, the employees had been terminated and not laid off.

If that case were brought to the NLRB, and if the employer contended that it did not make the contributions because of a disagreement over the interpretation of the terms of the expired collective bargaining agreement, the NLRB would conclude that the employer's refusal did not violate Section 8 of the NLRA. In *Mid-American Milling Co.*, 282 N.L.R.B. No. 135 (1987), the NLRB held that a

refusal to arbitrate a particular grievance did not constitute a repudiation of the employer's bargaining obligation, where the employer continued to apply the wage, fringe benefit and other provisions of the expired contract. In *Mid-American Milling Co.*, the NLRB concluded that an employer's single refusal to arbitrate a particular grievance may constitute a contract breach, even though the collective bargaining agreement had expired, but that it did not constitute a prima facie case that an unfair labor practice had occurred. As a result of its conclusion, the NLRB dismissed the unfair labor practice complaint.

If the doctrine of NLRA preemption precludes an action under ERISA to recover contributions due under the terms of an expired collective bargaining agreement. Tri-State will be left without a forum in which to argue that the employer's interpretation of the terms of the expired collective bargaining agreement is incorrect.

Such issues of interpretation are often faced by multi-employer funds. For example, one of Tri-State's most common disputes with contributing employers involves the issue of whether an individual is covered under the terms of a collective bargaining agreement. In such situations, the employer contributes for most of its employees but refuses to make contributions for one or more employees. The basis of the employer refusal to contribute is its contention that contributions are not due under the terms of its collective bargaining agreement. If this issue were to arise after an employer's agreement expires in a situation where the employer is obligated to continue contributions under the NLRA, the NLRB, applying the rationale of *Mid-American Milling Co., supra,* would hold that the employer

has not repudiated its bargaining obligation, and that, if anything, the employer has breached the contract.

The fact that a fund would be left without a forum to determine an issue of interpretation of a term of an expired collective bargaining agreement which has continued in effect because of Section 8 of the NLRA, precludes the application of the doctrine of NLRA preemption.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed and the Court should hold that the obligation to contribute under Section 515 of ERISA includes obligations to contribute under the terms of an expired collective bargaining agreement to which the employer is obligated to continue to adhere under Section 8(a) of the NLRA.

Respectfully submitted,

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